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No. 86 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

Randy Brame,

Petitioner,

v.

The United States,

Respondent.

Petition for a Writ of Certiorari

to the United States Court of Appeals

for the Federal Circuit

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Questions Presented

1. Whether the mere fact that, but for the Rule of Necessity, the judges of the courts below who decided this case would have been disqualified from so doing pursuant to 28 U.S.C. 455, imposes an obligation upon this Court, in the exercise of its supervisory functions over federal courts, to review the decision below holding that an employee of the Court of Claims was properly dismissed from his position, to make certain that the doing of justice is manifest.

2. Whether the Court of Appeals for the Federal Circuit erred in affirming the judgment of the United States Claims Court upon a ground different from that relied upon by the Claims Court, which new ground (that a change in appointment authority revokes all appointments made by the prior appointment authority) is in any event incorrect, if not spurious.

3. Whether the decision of the Claims Court, holding that the Federal Courts Improvement Act of 1982 had abolished the Court of Claims, and with it, all nonjudicial positions, was correct.

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Randy Brame,

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Petition for a Writ of Certiorari
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Petitioner Randy Brame respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Federal Circuit affirming the decision of the Claims Court holding that the petitioner's position as a custodial employee/messenger

of the Court of Claims had been abolished by the Federal Courts Improvement Act of 1982.

Opinions Below

The decision of the Court of Appeals for the Federal Circuit (which, at the direction of the Court, will not be published) is set forth in Appendix A (App., pp. 1a-5a). The decision of the Claims Court, reported at 10 Ct. Cl. 252, is set forth in Appendix B (pp. 6a-28a).

Jurisdiction

The decision of the Court of Appeals for the Federal Circuit was issued on March 3, 1987. The jurisdiction of this Court to review that decision is conferred by 28 U.S.C. 1254(1).

Statutes Involved

The statutes chiefly involved are 28 U.S.C. 455, 28 U.S.C. 794 (62 Stat. 924), 38 U.S.C. 2021(b)(3), and the Federal Courts Improvement Act of 1982, 96

Stat. 25, et seq. Pertinent portions of these and other statutes are set forth in Appendix E.

Statement of the Case

The petitioner, who was the plaintiff below, is a former clerical employee of the Court of Claims who contends that he was deprived of his position in violation (a) of the statute governing the discharge of clerical employees of the Court of Claims (28 U.S.C. 794, 62 Stat. 924), and (b) of the statute establishing the right of a member of a Reserve component of the Armed Forces to be free from discriminations motivated solely by his reserve status (38 U.S.C. 2021(b)(3)). The petitioner seeks reinstatement in his position, the award of back pay, costs and attorney's fees, and such other damages as might be warranted.

The pertinent facts, none of which is disputed, are as follows:

(1) The plaintiff entered on duty with the United States Court of Claims on January 5, 1976, as an employee in the excepted service, and he remained in the excepted service during his entire tenure with the Court of Claims. (See pages 12-13, Par. 3 of the Appendix filed with the plaintiff's brief in the Court of Appeals for the Federal Circuit, which will be cited herein as "Fed. Cir. App." The Appendix to this Petition will be cited simply as "App.") He had been hired by the Court of Claims under the provisions of 28 U.S.C. 794 (Fed. Cir. App., p. 26, Par. 4), which statute, prior to its amendment by the Federal Courts Improvement Act of 1982, Public Law 97-164, 96 Stat. 25 (hereafter referred to as the FCIA), read as follows:

> The Court of Claims shall appoint stenographic and other clerical employees in such numbers as may be necessary each of whom shall be subject to removal by the court.

[Emphasis supplied.]

(To distinguish statutes as they existed prior to their amendment by the Federal Courts Improvement Act of 1982 from statutes as they exist since their amendment, the former will be identified as "pre-FCIA" and the latter as "post-FCIA.")

(2) Plaintiff's initial position with the Court of Claims was custodial employee/messenger, JPS Grade 2, step 1. (Fed. Cir. App., p. 13.) He worked in the chambers of Judge Shiro Kashiwa, who had a good opinion of the plaintiff's abilities. (Fed. Cir. App., p. 56.) On October 1, 1978, plaintiff was transferred to the position of deputy clerk, JPS Grade 4, step 1, where he worked under the supervision of Mr. Frank Peartree, then Clerk of the Court of Claims, and since October 1, 1982 Clerk of the Claims Court. Mr. Peartree found the plaintiff's

performance of his assigned duties to be unacceptable, and was prepared to "terminate" him (Fed. Cir. App., p. 51, Par. 16), but instead, on May 21, 1979, the plaintiff returned to his former position as a messenger assigned to work for Judge Kashiwa. (Ibid.) In this position, designated as custodial employee/messenger, JPS Grade 2, step 9, the plaintiff remained until September 30, 1982, when the Court of Claims (and, according to the Government, the plaintiff's position) ceased to exist. (Fed. Cir. App., p. 13, Par. 3.)

(3) While working for the Court of Claims, the plaintiff enlisted in the United States Army Reserves. This occurred on July 13, 1981, on which date plaintiff was ordered to report to Fort Dix, New Jersey, where on July 17, 1981, he started an eight week course of basic training. (Fed. Cir. App., p. 15, Par.

17.) In the following year, plaintiff was on active duty with the United States Army Reserves from June 7, 1982 to September 3, 1982. (Fed. Cir. App., p. 15, Par. 18.)

(4) On April 2, 1982, the Federal Courts Improvement Act of 1982, Public Law 97-164, 96 Stat. 25, was enacted. As a consequence of the provisions of this statute, which became effective on October 1, 1982, the United States Court of Claims, as such, ceased to exist (Fed. Cir. App., p. 13, Par. 6), and a new court, the United States Claims Court, was created, and vested with substantially the same jurisdiction as had previously been exercised by the United States Court of Claims. (Fed. Cir. App., p. 7, Par. 7; Fed. Cir. App., p. 13, Par. 7.) In addition, the same statute discontinued the Court of Customs and Patent Appeals, and created the United States Court of Appeals for the Federal Circuit, which

also came into existence on October 1, 1982. (Fed. Cir. App., p. 13, Par. 6.) By the operation of Sections 165, 166 and 167 of the FCIA, the judges of the Court of Claims and of the Court of Customs and Patent Appeals became judges of the Court of Appeals for the Federal Circuit, the senior of the chief judges of the two old courts became the chief judge of the new court, and the Commissioners of the Court of Claims became judges of the Claims Court.

(5) At some time after his return from active duty with the United States Army Reserves on September 3, 1982, and prior to September 30, 1982, plaintiff learned that his name was not on the list of employees who after September 30, 1982, would be assigned to work either for the United States Claims Court or the United States Court of Appeals for the Federal Circuit. (Fed. Cir. App., p. 14, Par. 13.)

On September 30, 1982, Frank R. Peartree, the Clerk of the Court of Claims, signed a Notice of Separation (AO Form 197) advising the plaintiff that, effective that day, he was no longer employed by the Court of Claims because "No appointment received from U.S. Court of Appeals for the Federal Circuit." (Fed. Cir. App., p. 31.)

(6) An action alleging that the plaintiff was wrongfully dismissed from his position, because he had not been dismissed "by the court," and seeking restoration to his position, or one comparable to it, as well as the back pay due him as a consequence of the wrongful dismissal, and costs and attorney's fees, was initiated by the filing in the United States Claims Court of a complaint on February 9, 1984 (Fed. Cir. App., pp. 4 - 5), which complaint was amended on February 29, 1984. (Fed. Cir. App., pp. 6

- 11.) The jurisdiction of the Claims Court was invoked pursuant to 28 U.S.C. 1491.

(7) The Government, in its answer to the complaint, averred "that plaintiff was not removed from his position; his position was abolished [by the FCIA]; he did not receive an appointment to a new position and, therefore, he was separated from Federal employment." (Fed Cir. App., p. 13, Par. 5; p. 14, Par. 13.)

(8) Both parties filed motions for summary judgment. The plaintiff's contention was that the Court of Claims had not been abolished by the FCIA, but rather, continued in existence as the Claims Court, with substantially the same jurisdiction as had been exercised by the Court of Claims. The plaintiff pointed out that, except for himself, not one person had been dismissed from his or her job because of the supposed abolition of the

Court of Claims, but that in fact all positions had been transferred to the newly-created courts, and that every individual (except, of course, the plaintiff) who had been employed by Court of Claims at the close of business on September 30, 1982 had a job to which to report, either at the Claims Court or the Court of Appeals for the Federal Circuit, at the beginning of business on October 1, 1982. The plaintiff acknowledged that he was in the excepted service, and thus subject to dismissal from his position at any time, but argued that any dismissal must be effected in a manner authorized by law. Greenway v. United States, 163 Ct. Cl. 72, 76 (1963). The plaintiff contended that under the provisions of 28 U.S.C. 794 (pre-FCIA), he was subject to removal only "by the court," and that since, prior to the close of business on September 30, 1982, he had not been removed from his

position with the Court of Claims "by the court," (nor removed subsequent to October 1, 1982 in accordance with any statute applicable to the dismissal of clerical employees of the Claims Court or the Court of Appeals for the Federal Circuit), his deprivation of employment is illegal and of no effect. Vitarelli v. Seaton, 359 U.S. 535, 545 (1959). (This argument is set forth on pages 4 through 14 of the plaintiff's Memorandum in Support of its Motion for Summary Judgment, filed with the Court of Claims on October 5, 1984.) The Government, on pages 3-4 of its Memorandum in Support of its Motion for Summary Judgment, filed on November 2, 1984, responded:

> We concede that Mr. Brame was not "removed" by "the court" as that section [28 U.S.C. 794 pre-FCIA] required. However, this apparent shortcoming is of no moment because plaintiff was not "removed," "discharged," "terminated," "fired," or in any other way dismissed. Rather his position was abolished at the

same time that the Court of Claims was abolished under the Federal Courts Improvement Act.

(9) A year and a half later, in a decision dated June 30, 1986 (App. B, pp. 6a - 28a), Judge Moody R. Tidwell of the Claims Court held that the enactment by the Congress of the Federal Courts Improvement Act of 1982 "abolished the United States Court of Claims and all of its personnel positions, including plaintiff's." Consequently, Judge Tidwell denied the plaintiff's motion for summary judgment, and granted that of the defendant. (App B, p. 26a) By a judgment entered on the same day, the complaint was dismissed. (App. D, p. 30a)

(10) The plaintiff appealed to the Court of Appeals for the Federal Circuit from the decision of the Claims Court, setting forth various arguments in support of his contention that the FCIA had not abolished his position, or any clerical

positions, in the Court of Claims. (See pages 6 through 21 of the Brief for Appellant filed in the United States Court of Appeals for the Federal Circuit on October 14, 1986.) The Government, on page 9 of its brief in the Court of Appeals for the Federal Circuit, responded that "the plaintiff's employment was terminated by operation of law, not by the removal action of any court, officer, or administrative officer," and stated:

> We continue to concede as a non-issue Mr. Brame's contention that he "was not removed from his position in accordance with 28 U.S.C. 794, or any other statute." [Citation to plaintiff's brief omitted.] Plaintiff automatically ceased to be employed, effective with the close of business on September 30, 1982, when his position went out of existence.

(11) In a decision issued on March 3, 1987, the Court of Appeals for the Federal Circuit concluded (App. A, pp. 4a-5a) that

> by act of Congress [i.e., the FCIA] certain positions, such as the one

> filled by Brame, were abolished and appointment authority for certain positions changed. For an employee to occupy a newly-created position, or one having changed appointment authority, a new appointment by the proper official was required. Hence, Brame was not unlawfully removed from his employment because Congress, by statute, revoked his appointment as of October 1, 1982.

On this ground, the Court affirmed the decision of the Claims Court.

REASONS FOR GRANTING THE WRIT

> 1. The mere fact that, but for the Rule of Necessity, the judges of the courts below who decided this case would have been disqualified from so doing pursuant to 28 U.S.C. 455, imposes an obligation upon this Court, in the exercise of its supervisory functions over federal courts, to review the decision below holding that an employee of the Court of Claims was properly dismissed from his position, to make certain that the doing of justice is manifest.

By virtue of the fact that this is an action against the United States, founded upon an Act of Congress, and for an amount in excess of $10,000 (the plaintiff's salary at Grade JPS 2, step 9 from October 1, 1982, to the present

time), the only court having initial jurisdiction of the plaintiff's action is the Claims Court. See 28 U.S.C. 1491, and 28 U.S.C. 1346(a)(2) (App. E, pp. 34a and 43a). As of the time of the filing of the action (February 8, 1984), most of the judges of the Claims Court were (and many still are; see, e.g., 10 Ct. Cls. vi) persons who had been Commissioners of the Court of Claims, and these persons may well have had personal knowledge of the facts and individuals involved in this case. Judge Tidwell, to whom the case was assigned, had not been a member of the Court of Claims (he was appointed to the Claims Court on May 17, 1983), but he, of course, came to know, and every day worked with, persons who had been involved in this matter, including not only his fellow judges, but also the Clerk of the Court, Mr. Frank Peartree. This alone, rightly or wrongly, on its face gives rise to a

reasonable apprehension that the judge might be inclined to favor his professional colleagues in any action against them brought by a custodial employee.

It thus seems clear that Judge Tidwell came squarely within the purview of 28 U.S.C. 455, which in pertinent part provides that

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding * * * .

But, of course, the problem facing the court and the parties was that <u>every</u> judge of the Claims Court on the bench in February, 1984, came within the purview of 28 U.S.C. 455. Yet the Claims Court was

the only court in the United States having jurisdiction over the plaintiff's claim. For this reason the plaintiff, mindful of this Court's holding in United States v. Will, 449 U.S. 200, 211 - 217 (1980), that pursuant to the Rule of Necessity a judge disqualified from hearing a case pursuant to 28 U.S.C. 455 must nevertheless hear and decide the case if it cannot otherwise be heard, did not raise the issue of disqualification, but, since there was no alternative, proceeded to present his arguments and contentions to Judge Tidwell.

Judge Tidwell held against the plaintiff. In one paragraph of his decision (App. B, p. 10a) he wrote:

> It should be understood that in planning the creation of the two new courts, those positions that were assigned to the appellate division of the United States Court of Claims would be assumed by the United States Court of Appeals for the Federal Circuit. All other positions would be assigned to the United States

> Claims Court. Since plaintiff's position was assigned to the appellate division of the United States Court of Claims, his position would be assumed by the United States Court of Appeals for the Federal Circuit.

This statement of the policy involved in planning the "creation" of the two new courts is helpful to the plaintiff, who prior to filing his amended complaint had tried, but failed, to find some written document embodying more or less the substance of this paragraph, to the effect that positions in the pre-FCIA courts were "assumed by" the post-FCIA courts (thus indicating clearly the understanding of all persons implementing the FCIA in 1982 that positions in the Court of Claims were not "abolished," for otherwise they could not have survived to be "assigned to" or "assumed by" other courts). But the policy information set forth by the Court in this helpful paragraph is nowhere in the record. Nor

could it have been conveyed to the Court during oral argument, for there was no oral argument. So this information gratuitously supplied by the judge shows that he did, indeed, have some "personal knowledge of disputed evidentiary facts concerning the proceeding" which in fact as well as appearance brought him within the purview of 28 U.S.C. 455, and would have disqualified him, but for the Rule of Necessity.

From the decision of the Claims Court, the plaintiff appealed to the Court of Appeals for the Federal Circuit which is, pursuant to 28 U.S.C. 1295(a)(3) (App. E, p. 43a) the only Court having jurisdiction of an appeal from the Claims Court. The same problem was again presented. At the time that this case was heard by the Court of Appeals for the Federal Circuit (i.e., in February, 1987) all of the judges in that court, save for

three, had previously been judges either of the Court of Claims or the Court of Custom and Patent Appeals. The three judges who had not been members of either of the previous courts were the judges assigned to hear and decide the plaintiff's appeal, but these judges, like Judge Tidwell in the Claims Court, were undoubtedly within the purview of 28 U.S.C. 455, by virtue of their possible personal knowledge of disputed facts and their possible disinclination to subject the Government to liability because of a personnel decision in which some of their colleagues, including the Chief Judge, may have participated. In any event, the Court of Appeals for the Federal Circuit affirmed the decision of the Claims Court.

The plaintiff is thus in the situation where the only Court having the jurisdiction to decide this case, the judges of which are not within the purview

of 28 U.S.C. 455, is the one to which this petition is addressed. The plaintiff will hereafter show that the decisions of the courts below are incorrect - - grossly and incomprehensibly incorrect. At this point, however, the plaintiff suggests that the mere fact that he lost in federal courts, the judges of which would have been disqualified from hearing his case but for the Rule of Necessity, should be sufficient to induce this Court, in the exercise its supervisory functions over those courts, to review their decisions to assure itself, and the plaintiff, that justice indeed was done - - "that the waters of justice are not polluted." Mesarosh v. United States, 352 U.S. 1, 14 (1956). The spirit informing this suggestion was eloquently set forth by this Court in Communist Party of the United States v. Subversive Activities Control Board, 351 U.S. 115, 124 (1956):

> The untainted administration of justice is surely one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in the federal courts. See McNabb v. United States, 318 U.S. 332. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.

And when the Court reviews the decisions below, it will find that what is irrational and perverse is not the contention of the petitioner, but the rationales and conclusions of the decisions he seeks to have reviewed.

> 2. The Court of Appeals for the Federal Circuit erred in affirming the judgment of the United States Claims Court upon a ground different from that relied upon by the Claims Court, which new ground was not mentioned, briefed or argued before either Court by either party, and which ground is in any event incorrect, if not spurious.

As the statement of the case shows, the sole argument made by the

Government throughout this litigation has been that the plaintiff's position was abolished as a consequence of the supposed abolition of the Court of Claims. It was exclusively on this ground -- that the Court of Claims had been abolished, and with it, the plaintiff's position -- that the Claims Court found for the Government and dismissed the complaint (App. B, pp. 14a, 16a), and it was exclusively on this ground that the Government urged the Court of Appeals for the Federal Circuit to affirm the decision of the Claims Court (see brief for the Government in the Court of Appeals for the Federal Circuit, p. 4).

But the Court of Appeals, without any discussion whatsoever of the contentions of either party with respect to whether or not the Court of Claims had been abolished, merely stated that "under the Act [that is, the FCIA], the United

States Court of Claims and the Court of Customs and Patent Appeals (CCPA) were merged together to form the newly created Court of Appeals for the Federal Circuit" (Emphasis supplied; App. A, p. 2a). This seems to be a rejection of the lower court's holding and the Government's contention that the Court of Claims had been abolished (for a merger of one organization with another to form a third implies continuity, rather than dissolution), but exactly what the Appellate Court deemed to be the consequences of its observation with respect to the merger of the two courts (rather than their abolition) is unclear. (One of the difficulties of dealing with the Appellate Court's decision is that it is written in a vague, imprecise way, which requires the plaintiff, before he can discuss any portion of it, first to attempt to state what it might mean.) Apparently the

Court's next statement, that "in addition to merging these two courts, Congress created an entirely new court, the United States Claims Court," is intended to be a basis for a conclusion, implied rather than expressed, that since the Claims Court is not the continuation of the Court of Claims (but is an "entirely new court"), the plaintiff's position cannot be deemed to have passed to the Claims Court, and therefore must have been abolished.

In the next portion of this petition, we shall show that the Appellate Court's conclusion that the Claims Court is an "entirely new court" is incorrect; here it suffices to point out that regardless of whether or not the Appellate Court is correct about the Claims Court being new, its conclusion that the Court of Claims merged with another Court to create the Court of Appeals for the

Federal Circuit is completely inconsistent with the government's contention that the Court of Claims was abolished, and completely consistent with the plaintiff's contention that his position survived to pass (as did in fact the positions of all of his co-workers) to whatever court may be deemed to be the continuation of the Court of Claims. Therefore, if the Appellate Court was to sustain the Government's position (as it seemed determined to do), it had to find another rationale to justify the plaintiff's dismissal, and this it proceeded to do by turning to a new subject, "the appointment authority of these courts" (App. A, p. 3a, sentence [1]). The Court's two-paragraph discursion upon this new subject ended with the statement that "Brame was not unlawfully removed from his employment because Congress, by statute, revoked his appointment as of October 1, 1982" (App.

A, p. 5a, sentence [9]). Thus, on appeal, without benefit of briefing from either party, the Court came up on its own with a new theory for upholding the dismissal of the plaintiff: not that Mr. Brame's position had been abolished, but that Mr. Brame's appointment to his position had been revoked - - an entirely novel conception, for the initial review of which the plaintiff is compelled to apply to this Court.

As we shall presently demonstrate, the Appellate Court's analysis leading to its conclusion that the plaintiff's appointment had been revoked is riddled with error; preliminarily, however, we point out that the mere fact that the Appellate Court based its decision on a ground not previously argued or briefed was in and of itself entirely improper. As this Court stated long ago, "a judgment cannot be affirmed upon a ground not taken

at the trial, unless it is made clear beyond doubt that this could not prejudice the rights of the plaintiff in error." Peck v. Heurich, 167 U.S. 624, 629 (1897). See also Sacramento Suburban Fruit Lands v. Melin, 36 F.2d 907, 909 (C.A. 2, 1929): "to affirm a judgment for a reason apparently never thought of by the lower court or either party to the controversy would hardly be consistent with the spirit of modern judicial administration."

Obviously, it was very prejudicial to the rights of the plaintiff for the Court of Appeals for the Federal Circuit to reject (as apparently it did) the one and only contention made by the Government to justify the separation of the plaintiff from his job, and then on its own to think up another reason - - to which the plaintiff had no opportunity to respond - - to justify the Government's action. Such judicial initiative and imagination is

particularly invidious when exercised to validate the challenged actions of persons who are colleagues of the judges rendering the decision.

We now turn to a sentence-by-sentence examination of the Appellate Court's two-paragraph discursion (App. A, pp. 3a-5a), to demonstrate its extraordinary inaccuracy. The first sentence (to facilitate reference, the sentences here discussed, as printed in the Appendix, each have a number supplied) announces, as we have noted, that it is the "appointment authority" provided for in the FCIA which the Court will address, and the second sentence states that "the authority of the Court of Claims to hire messengers did not carry over unchanged to the Federal Circuit." The point of this enigmatic sentence appears to be that the Court which succeeded the Court of Claims was not vested with a messenger-hiring

authority expressed in exactly the same language as the messenger-hiring authority of the Court of Claims had been expressed.

That, at any rate, seems to be the line of thought which Sentence 3 begins to develop:

> [3] In particular, 28 U.S.C. §795 (1976) provided that "[t]he Court of Claims may appoint a bailiff and a messenger who shall be subject to removal by the court."

Now, this statement is perfectly correct, as far as it goes, but it reveals that the Court is under the impression that the plaintiff contends that he was hired pursuant to 28 U.S.C. 795, and cannot be fired save by compliance with 28 U.S.C. 795. And to be sure, in his amended complaint, the plaintiff did assert that his rights derived from 28 U.S.C. 795 (Cir. Ct. App., p. 8, Par. 14). But thereafter the Government, in its response to the plaintiff's second set of interrogatories, stated that "although Mr.

Brame was assigned to the personal staff of a judge of the Court of Claims [Judge Kashiwa], he was formally an employee of the court under the former provisions of 28 U.S.C. 794" (Cir. Ct. App., p. 26, Par. 4; emphasis supplied.) The plaintiff accepted this correction, and always subsequently in this litigation based his claims and rights upon 28 U.S.C. 794, pre-FCIA. See, e.g., pages 1, 2, 4, 14, 18 and 20 of plaintiff's Memorandum in Support of his Motion for Summary Judgment in the Claims Court, and pages 1, 2, 5, 22, 25, 29 and 31 of plaintiff's brief in the United States Court of Appeals for the Federal Circuit. As the Government itself pointed out on page 4 of its brief in the Court of Appeals, "Mr. Brame does not dispute the fact that he was appointed as a custodial employee/messenger of the Court of Claims under the authority of 28 U.S.C. 794 (1976)."

To a certain extent, the fact that the Court cites 28 U.S.C. 795, instead of the correct statute, 28 U.S.C. 794, is not legally significant, for the argument that the Court proceeds to develop with respect to 28 U.S.C. 795 applies equally aptly (and equally incorrectly) to 28 U.S.C. 794. But that the Court of Appeals is under the impression that the plaintiff was hired pursuant to 28 U.S.C. 795 gives rise to a strong suspicion that the Court did not read the briefs of either party. (If the Court intended a sub silentio correction, that correction was wrong. More likely, the Appellate Court merely copied from the decision of the lower court, which also, completely ignoring the parties' briefs, characterized the plaintiff's argument as being based upon 28 U.S.C. 795 (App. B, p. 13a), but the Claims Court's error was immaterial in view of its holding that all positions in

the Court of Claims were abolished by the FCIA.)

The Court's explanation proceeds:

> [4] The position was a personal staff position with the particular member of the court, in this case Judge Kashiwa.

The calculated deceptiveness of the Court's analysis here begins to become apparent. The Court, of course, is correct in stating that the plaintiff was assigned to the personal staff of Judge Kashiwa, but the Court's ingenuous implication that the position mentioned in sentence 3 (whether that be the position authorized by 28 U.S.C. 795, as the Court erroneously stated, or the position authorized by 28 U.S.C. 794, as the Court should have stated) was by statute a personal staff position, is completely incorrect: neither 28 U.S.C. 794 nor 28 U.S.C. 795 mentions personal staff positions. (And the Government has stated that the messenger

appointed pursuant to 28 U.S.C. 795 pre-FCIA (which authorized the appointment of one messenger only) served as a messenger to the court, as opposed to a messenger serving on the individual staff of a judge. See Cir. Ct. App., p. 32, par. 2. The lower court also erroneously suggested (App. B, p. 28a, fn. 3) that a statute specifically authorized personal staff positions, but once again, the error was immaterial, because the holding was not based upon it.) If persons hired pursuant to 28 U.S.C. 794 were assigned to the personal staff of various judges, as they were, this was a matter of Court practice rather than of statutory requirement.

In sentences 5 and 6, the Court proceeds with its correct statements and incorrect implications:

> [5] With the advent of the Act [i.e., the FCIA]: (1) Section 795 was amended and became applicable to the new Claims Court (see 28 U.S.C. §795 (1982) ("The chief judge of United

> States Claims Court, with the approval of the court, may appoint necessary bailiffs and messengers . . . . ")) and (2) the Court of Claims merged with the CCPA and no authority was provided for personal messengers for the individual judges. [Emphasis supplied.]
>
> [6] See 28 U.S.C. §714 (1982) ("(a) Each court of appeals may appoint a crier who shall be subject to removal by the court. (b) The crier, with the approval of the court, may appoint necessary messengers in such number as the Director of the Administrative Office of the United States Courts may approve,"); 28 U.S.C. 711 (1982) ("(a) Each court of appeals may appoint a clerk . . . . . (b) The clerk, with the approval of the court, may appoint necessary deputies, clerical assistants and employees . . . . . ").

Again, sentence 5 is correct, so far as it goes, but the latter, emphasized, portion of the sentence is clearly intended by the Court to suggest that 28 U.S.C. 795 post-FCIA, to the extent that it does not expressly authorize the appointment of personal messengers for the individual judges, is different from 28 U.S.C. 795 pre-FCIA.

However, as we have seen, 28 U.S.C. 795, as well as 28 U.S.C. 794, prior to their amendment by the FCIA, made absolutely no mention of personal messengers for the individual judges, so in this respect 28 U.S.C. 795 post-FCIA, is exactly the same as 28 U.S.C. 795 as it existed prior to the amendment.

Sentence 6, which like sentence 5, merely quotes statutes, quotes them correctly (although it erroneously implies that 28 U.S.C. 711 was amended by the FCIA). The thought advanced by these quotations seems to be that whereas the pre-FCIA statutes (i.e., 28 U.S.C. 795 pre-FCIA, referred to by the Court in sentence 3, and 28 U.S.C. 794 pre-FCIA, which is the statute the court should have referred to) authorized "the Court of Claims" to appoint a messenger and other clerical employees, the post-FCIA statutes confer upon <u>other</u> officials (such as the

"chief judge of the United States Claims Court," "the crier, with the approval of the court [of appeals]" and "the clerk, with the approval of the court [of appeals]) the authority to appoint such personnel. This point (if indeed this is the point), that appointment authority for certain positions was changed, is certainly true; indeed, since the Court of Claims as an administrative entity no longer existed after September 30, 1982, appointment authority for all positions in that Court was changed.

In the last three sentences, on the basis of the foregoing misstatements of fact, mischaracterizations of statutes, incorrect premises and false assumptions, the Court arrives at its necessarily erroneous conclusions of law:

> [7] Consequently, by act of Congress certain positions, such as the one filled by Brame, were abolished and appointment authority for certain positions changed.

> [8] For an employee to occupy a newly-created position, or one having changed appointment authority, a new appointment by the proper official was required.
>
> [9] Hence, Brame was not unlawfully removed from his employment because Congress, by statute, revoked his appointment as of October 1, 1982.

The conclusion set forth in the first part of sentence 7, that the plaintiff's position was abolished, is apparently based upon the nonexistent but Court-announced "fact" that the pre-FCIA statute pursuant to which the plaintiff had been hired expressly provided for personal staff positions, whereas the applicable post-FCIA statute (whatever that may be) does not. This is so flagrantly false a conclusion based upon so blatantly false a premise that the extent or motive of the Appellate Court's consideration of the case cannot but be called into question.

The second conclusion set forth in

sentence 7, that appointment authority for certain positions was changed, is undeniably true. And equally true is that portion of sentence 8 which announces that "for an employee to occupy a newly-created position, * * * a new appointment by the proper official was required." But intermixed with these correct (and irrelevant) conclusions, is the incorrect conclusion (in sentence 8) that "for an employee to occupy a * * * position * * * having changed appointment authority, a new appointment by the proper official was required." Upon this statement is founded, apparently, the Court's ultimate conclusion, that "Brame was not unlawfully removed from his employment because Congress, by statute, revoked his appointment as of October 1, 1982."

The Court cites no authority for its remarkable statement that changing the appointment authority for a position

revokes an appointment made pursuant to prior authority, and in fact no authority for this proposition exists. The proposition, indeed, is irreconcileably contrary to a fundamental canon of statutory interpretation, that statutes and amendments to statutes are to be construed as operating prospectively, unless an intention that they shall have retrospective effect is clearly expressed. Brewster v. Gage, 280 U.S. 327, 337 (1930); U.S. v. Magnolia Petroleum Co., 276 U.S. 160, 162-163 (1928). No such intention is expressed in the FCIA; thus, if any provision of the FCIA did in fact substantially change the appointment authority for the plaintiff's position (for it can be argued that the court itself really retains the appointment authority when its officers have the power to appoint subordinates only "with the approval of the court"), then that provision can operate prospectively only.

See Suermann v. Hadley, 193 A. 645, 650-651 (Sup. Ct. Pa., 1937):

> As the act did not, in terms, abolish the offices of the old members, the provisions for appointment of new members must be construed to be prospective. The old members will, therefore, continue in their offices until the expiration of the terms for which they were appointed by the judges. The Legislature may change an "appointive power" but in so doing, generally speaking, it acts prospectively as in this case.

And, we believe, this is in fact the interpretation which the Courts of Appeals themselves and the Administrative Office of the U.S. Courts have given to other sections of the FCIA changing in a similar way their authority to make appointments for certain positions.

For example: 28 U.S.C. 713(a), pre-FCIA (App. E., p. 32a) authorized "each court of appeals" to appoint library assistants and messengers; this was amended by Sections 120(b)(1) and (c)(1) of the FCIA (App. E, pp. 38a-40a) to

authorize librarians and criers, respectively, "with the approval of the court," to appoint library assistants and messengers.

If the decision of the Court of Appeals for the Federal Circuit is correct, then each and every assistant librarian and messenger working for the Courts of Appeals for each and every one of the other twelve circuits on September 30, 1982 automatically had his or her appointment revoked at the close of business on that day by the operation of the FCIA and, unless immediately reappointed, was without a job the next day. The plaintiff strongly suspects that the thought that the amendments effected by the FCIA deprived assistant librarians and messengers of the Courts of Appeals of their positions never occurred to anyone in those courts, or in the Administrative Office of the United States Courts.

We say that we suspect that this is so because we don't know. After the decision of the Court of Appeals was rendered, the plaintiff requested the Government to supply, either pursuant to the Freedom of Information Act or provisions regarding discovery, data to ascertain whether any of these Courts fired or rehired personnel in accordance with the proposition discovered by the Court of Appeals for the Federal Circuit. This is of significance, of course, because in construing a statute, "the interpretation of an agency charged with the administration of a statute is entitled to substantial deference. Connecticut Department of Income Maintenance v. Heckler, 471 U.S. 524, 532 (1985).

The Government refused to supply this information, on the grounds that the Freedom of Information Act does not apply to the Judicial Branch of the Government,

and that the period for discovery was closed before the filing of motions for summary judgment in the Claims Court (App. G,p. 64a). Whatever merit the Government's response might have, it concretely illustrates our contention made earlier, that the Appellate Court's decision on a ground not previously raised or briefed by either party was grossly improper, since it is not possible for us at this late stage of the litigation to obtain factual information to contradict or refute the Court's holding. In any event, the Government's response does nothing to dispel the plaintiff's conviction that not one assistant librarian or messenger employed by any of the courts of appeals was deemed to have had his or her position revoked as a consequence of the change in appointing authority effected by the FCIA.

To conclude, then, this portion of our petition: the Court of Appeals, in its

brief decision,

(a) without discussion rejected the reason given by the court below for its decision, and then sought out some other reason for affirming that decision, without giving the plaintiff the opportunity to respond to the new legal theory;

(b) cited the wrong statute as the basis for the plaintiff's claim;

(c) erroneously characterized the statute as expressly authorizing personal staff positions (a characterization not correct for any pertinent statute);

(d) erroneously stated that the statute as amended differed from the original statute by not authorizing personal staff positions;

(e) on the basis of these erroneous statements, incorrectly concluded that the plaintiff's position had been abolished; and

(f) with no discussion or citation

to any authority whatsoever, in violation of the ordinary canons of statutory construction, and in probable disregard of the actual practice of the appellate courts, held that the change in the appointing authority for the plaintiff's position was a statutory revocation of that position.

It is not surprising that the Court forbade the publication of its decision which, published or not, should be reversed.

3. The decision of the Claims Court, holding that the plaintiff's position had been abolished by virtue of the operation of the Federal Courts Improvement Act of 1982, was incorrect.

In anticipation of the Government's response that although the Court of Appeals may have erred in affirming the Claims Court's decision on a ground not argued and briefed, nevertheless the Claims Court's decision was correct and

should be affirmed for the reasons therein set forth, we now turn to that decision, to demonstrate its complete error.

The core of the Claims Court's decision is as follows (App. B, p. 16a):

> In the instant case, the enactment of the FCIA repealed the law which created the United States Court of Claims and all personnel positions, including the plaintiff's. The only exception provided in the act was for the judicial positions which were retained under the Act. This is a clear indication of the Congressional understanding and intent that all other positions were not to survive.

This conclusion is wrong for many reasons, all of which were set forth by the plaintiff in his briefs on appeal. Page limitations require the plaintiff here to focus on his three main contentions.

> A. The language and legislative history of the FCIA show that Congress was told by court officials, and intended, that all positions in the Court of Claims would be transferred to either the Claims Court or the Court of Appeals for the Federal Circuit.

Initially, we note that, contrary to the statement of the Claims Court, the FCIA in fact did not repeal the law creating the Court of Claims; it amended that law (see Section 105 of the FCIA, 96 Stat. 26 - 28 and Section 133, 96 Stat. 39 - 41; App. E, pp. 36a-37a and 4 a). On the other hand, the FCIA did expressly abolish the United States Court of Customs and Patent appeals, by repealing all the statutes relating to it. Sections 106, 122, 123 and 140, FCIA (App. E, pp. 37a, 42a, 43a and 46a). Following the logic of the Claims Court's decision, this amendment of the statutes relating to the Court of Claims and repeal of the statutes relating to the Court of Customs and Patent Appeals could be deemed a "clear indication of Congressional intent" that the Court of Claims, and its positions (including that of the plaintiff), were to survive and that the other Court, and

its positions, were not to survive.

The fact is, however, that another provision of the FCIA, Section 119(b), 96 Stat. 33, makes unmistakably clear the intention of the Congress that the positions of all personnel in both courts be continued. Section 119(b) (App. E, pp. 37a-38a) provides in part that

> Funds appropriated to the Court of Customs and Patent Appeals and the Court of Claims for fiscal year 1982 shall be made available for the operation of the United States Court of Appeals for the Federal Circuit and the United States Claims Court. Such sums shall be apportioned among the new appropriations as determined by the Director of the Administrative Office of the United States Courts in consultation with the chief judges of the respective courts.

By this provision Congress ensured that both of the newly created courts had available between them at least all of the monies which their predecessor courts had had, to pay the salaries of <u>all</u> of the personnel employed by the predecessor

courts (plus "new appropriations" for additional positions and expenses). The purposes and consequences of this provision - - to continue the funding of all Court positions - - are completely inconsistent with, and refute, the Government's contention and the Claims Court's holding that the FCIA abolished all nonjudicial positions in the Court of Claims.

And the legislative history of FCIA fully supports this conclusion.

The FCIA's ancestors are S. 677 and S. 678, introduced on March 15, 1979. At hearings on these bills held in the spring of 1979, Edward V. Garabedian, Chief and Comptroller of the Financial Management Division, Administrative Office of the U.S, Courts, testified with respect to their budgetary impact. He prepared a chart, showing that there were employed by the Court of Claims and the Court of

Customs and Patent Appeals 150 persons, that S. 678, if enacted, would create 36 new positions, and that S. 677, if enacted, would create 27 new positions. The premise of Mr. Garabedian's testimony was that all of the 150 positions then existing in the Court of Claims and Court of Customs and Patent Appeals would be transferred to the new courts, along with the appropriations to support them. (Hearings on S. 677 and 678, Serial No. 96-24, pp. 97 - 107; Cir. Ct. App., pp. 68 - 74.)

As a result of the hearings, S. 678 and S. 677 were significantly revised and introduced as a clean bill, S. 1477. Senate Report No. 96-304, pp. 1 - 2 (Cir. Ct. App., pp. 75 - 76). S. 1477 passed the Senate on October 30, 1979. H.R. 3806, a similar bill, passed the House on September 15, 1980. However, the conference bill was not passed by the Senate,

but was withdrawn because of an attempt to add to it a controversial nongermane amendment (Senate Report No. 97 - 275, pp. 1- 2; Cir. Ct. App., pp. 83 - 84).

In the 97th Congress, S. 21, incorporating most of the provisions of S. 1477, was introduced. After hearings, certain technical amendments were made, and a new clean bill was introduced as S. 1700.

S. 1700 was passed by the House on March 9, 1982. On that very day, the Judiciary Subcommittee of the House Committee on Appropriations was holding hearings on the fiscal year 1983 budget requests for the Court of Customs and Patent Appeals and the Court of Claims. Chief Judge Howard T. Markey of the Court of Customs and Patent Appeals, accompanied by Mr. George Hutchinson, the Clerk of that Court, appeared before the Committee, and submitted a chart entitled "Proposed

Staffing," showing that all of the personnel of the two old courts would be divided between the two new courts: the entire staff of the Court of Customs and Patent Appeals, consisting of 36 persons, would be transferred to the New Federal Circuit Court of Appeals, as would also 36 persons from the Court of Claims. All of the remaining personnel of the Court of Claims, comprising 78 persons, the chart showed, were to be assigned to the new Claims Court. The chart had at the end of it a note expressly stating that "Staffing and funding for the Claims Court are based on the concept that presently assigned staff will be retained by that court. The Administrative Office of U.S. Courts intends to conduct a work measurement study of that court and if that study results in changes in staffing and funding, these changes will be reported to the committee" (App. F, p. 58a).

Later in the day, Chief Judge Daniel M. Friedman of the Court of Claims, accompanied by Mr. Frank T. Peartree, the Clerk of the Court of Claims, appeared before the same Subcommittee, and in response to the same question from Congressman Hightower, presented the same chart, with the same note at the end (App. F, p. 63a).

S. 1700 was passed by the Senate on March 22, 1982, and signed by the President on April 2, 1982.

This review of the legislative history of the FCIA makes two things incontestably clear. The first is that from the beginning, it was taken for granted by all persons who in their official capacities were most intimately involved with the proposed new statute -- by Mr. Garabedian, Chief and Comptrollor of the Financial Management Division, Administrative Office of the

U.S. Courts, by Judge Howard T. Markey, Chief Judge of the Court of Customs and Patent Appeals, and Judge Daniel M. Friedman, Chief Judge of the Court of Claims - - that all personnel employed by both of the Courts to be "abolished" would be transferred to corresponding positions in the two Courts to be created, which premise was, as we have seen, expressly stated to the various Congressional Committees which had the duties of creating and funding the new courts.

The second is that the Congress, by dividing between the two new courts the entire funding previously allocated to the two old courts, necessarily understood, accepted and legislatively approved the premises and representations of Mr. Garabedian and Judges Markey and Friedman, that all of the staff of the old courts would continue in their employment with the new courts.

B. Congress expressly stated that the premise for the constitionality of the judicial appointments effected by Sections 165, 166 and 167 is that the courts and positions established by the FCIA are not new, but are continuations of the previously-existing courts and positions.

Sections 165, 166 and 167 of the FCIA (App. E, pp. 46a-48a), which designate as judges of the new courts the judges and trial judges of the old courts, first appeared in H.R. 3806. The House Committee on the Judiciary, in its report recommending the passage of H.R. 3806 (House Report No. 96-1300, p. 23; App. F, pp. 50a-53a) noted that this Court's decision in Buckley v. Valeo, 424 U.S. 1, 118 - 136 (1976) presented Constitutional obstacles to the Congressional (as opposed to Presidential) appointment of judges, and stated that the express designation in H.R. 3806 of the specific judges who would serve on the Court of Claims and the Court of Appeals for the Federal Circuit did not

constitute new appointments, but only extended the tenure of existing judges: Congress' understanding was that it was merely "reallocat[ing] the business and personnel of the lower federal courts" (App. F, p. 53a).

Congress' justification of its authority to designate persons to fill judicial positions - - that it was merely perpetuating a pre-existing condition - - is completely at odds with the holding of the Claims Court (App. B, p. 14a), that all of the positions in the Court of Claims, "with the exception of the judges" (App. B. p. 10a) were abolished when the Court of Claims was "abolished." "Abolished positions" by definition are not "existing positions" capable of modification; they are non-existent positions. Nor, contrary to the happy assumption of the Claims Court, does Congress have the power to except from abolition the

positions of judges, if in fact it abolishes the bench upon which they sit; the Constitution forbids this. Buckley v. Valeo, 424 U.S. 1, 118-136 (1976).

Similarly, the Congress' explanation that "the carry-over of the trial judges into the Claims Court is a modification of an existing position rather than a legislative appointment to a new one * * * " (App. F, p. 5 a) entirely contradicts the Court of Appeals' statement (App. A, p. 3a), that the United States Claims Court was "an entirely new court."

In fine, the decisions below are wrong; but if the Claims Court is correct in its conclusion that the FCIA abolished the Court of Claims and the Court of Customs and Patent Appeals, or if the Court of Appeals for the Federal Circuit is correct in its statement that the Claims Court is an entirely new court,

then those courts, or this Court, have a duty to explain by what warrant the persons who are presently judges by virtue of Sections 165, 166 and 167 of the FCIA hold their positions. What is sauce for the goose is sauce for the gander.

C. The fact that the plaintiff was the only one of the 86 employees of the Court of Claims to lose his job as a supposed consequence of the abolition of that court renders suspect the Government's post hoc justification of his dismissal.

The plaintiff, of all the employees of the Court of Claims, was the only one to lose his job on the suppose ground of the abolition of the Court: all the other employees were, as a matter of course, assigned to one or the other of the two new courts. The Claims Court, in a footnote to its decision (App. B, p. 28a, fn. 4) states that "two other individuals were not selected * * * . Thus their appointments expired on September 30,

1982, just as did plaintiff's." The Court is referring to Kathleen Nogaki and Dubois Ashton, who, the Government implied in its answers to the Plaintiff's Second Set of Interrogatories (Cir. Ct. App., p. 29), like the plaintiff, had their positions abolished. But the Government's answers to the Plaintiff's Third Set of Interrogatories (which the Claims Court completely ignored), acknowledge (1) that Ms. Nogaki was not automatically dismissed on September 30 because the Court was abolished, but was dismissed some time after October 1 because the judge for whom she worked no longer desired her services (Cir. Ct. App., p. 39), and (2) that Mr. Ashton lost his job because "an event occurred prior to October 1, 1982, as a consequence of which a determination was made not to retain Mr. Ashton in his job" (Ibid.). And, truth to tell, the plaintiff, also, was not, at the time he

was fired, deemed to have lost his job because of the abolition of the court; he was fired, as the record shows (Cir. Ct. App., pp. 31 and 52) and as the Claims Court so clearly states, "because the appellate division of the United States Court of Claims (the soon to be created United States Court of Appeals for the Federal Circuit) had decided to abolish the plaintiff's position as soon as it became a separate court, and not to appoint Mr. Brame to any other position" (App. B, pp. 9a-10a; emphasis supplied). This is what the plaintiff always has contended: that he was removed from his position, not by an Act of Congress, but by an action of a court official purporting to remove the plaintiff from his position in a manner not authorized by 28 U.S.C. 794, pre-FCIA. The Government's claim that the plaintiff lost his job as a consequence of the abolition of the Court

of Claims was advanced for the first time after this suit was initiated, and is manifestly a post-hoc rationalization devised to provide a justification for the otherwise improper and illegal actions by which the plaintiff was separated from his position.

This brings us finally to the plaintiff's claim under 38 U.S.C. 2021(b)(3). In Monroe v. Standard Oil Co., 452 U.S. 549, 559-560 (1981) this Court stated that the purpose of this statute was "to protect reservists from the temptations of employers to deny them the same treatment afforded their co-workers without military obligations." Obviously, if the petitioner was fired by the Congress, then 38 U.S.C. 2021(b)(3) is not applicable. But if the petitioner was not removed by the Congress, then the failure to remove him in compliance with 28 U.S.C. 794 pre-FCIA is compounded by

the failure to accord him the rights secured by 38 U.S.C. 2021(b)(3), for surely, this sole victim of the FCIA did not receive the same treatment afforded his co-workers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. The petitioner also suggests that this petition, together with the Court of Appeals' record in this case and such additional briefs as either party may file, will provide all the information required for this Court to dispose of the case summarily on the merits. The petitioner prays that this be done: that the decision of the United State Court of Appeals for the Federal Circuit be reversed, and that the petitioner be reinstated in his former (or a comparable) position, and awarded back pay, as well as costs and attorney's fees, plus such other

relief as may adequately compensate him for the hardships attendant upon the illegal loss of his position and income.

Respectfully submitted.

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Petitioner

June 1, 1987

APPENDIX

APPENDIX A

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RANDY BRAME,)

Appellant,)

v.) Appeal No. 86-1627

THE UNITED STATES,)

Appellee.)

DECIDED: March 3, 1987

Before NEWMAN, BISSELL, and ARCHER, Circuit Judges.

BISSELL, Circuit Judge.

DECISION

The judgment of the United States Claims Court, No. 58-84C, dismissing the complaint of Randy Brame in which he demanded back pay, reinstatement to his

job or to a comparable job, costs and attorney's fees, is affirmed.

OPINION

The issue on appeal is whether the Claims Court committed an error of law in concluding that Brame was not unlawfully removed from his position as a custodial employee/messenger of the United States Court of Claims. Brame's argument that he was improperly removed by the United States Court of Claims is based on an erroneous understanding of the statutes governing the administration of that court and the courts created by the Federal Courts Improvement Act of 1982 (Act), Pub. L. No. 97-164, 96 Stat. 25, which became effective October 1, 1982. Under the Act, the United States Court of Claims and the Court of Customs and Patent Appeals (CCPA) were merged together to form the newly created Court of Appeals for the Federal Circuit. In addition to merging these two

courts, Congress created an entirely new court, the United States Claims Court.

[1] It is important to understand the nature of the changes made by the Act in order to appreciate the appointment authority of these courts and the various administrative officials charged with administering these courts. [2] The authority of the Court of Claims to hire messengers did not carry over unchanged to the Federal Circuit. [3] In particular, 28 U.S.C. § 795 (1976) provided that "[t]he Court of Claims may appoint a bailiff and a messenger who shall be subject to removal by the court." [4] The position was a personal staff position with the particular member of the court, in this case Judge Kashiwa. [5] With the advent of the Act: (1) Section 795 was amended to become applicable to the new Claims Court (see 28 U.S.C. § 795 (1982) ("The chief judge of the United States Claims Court,

with the approval of the court, may appoint necessary bailiffs and messengers . . . . ")) and (2) the Court of Claims merged with the CCPA and no authority was provided for personal messengers for the individual judges. [6] See 28 U.S.C. § 714 (1982) ("(a) Each court of appeals may appoint a crier who shall be subject to removal by the court. (b) The crier, with the approval of the court, may appoint necessary messengers in such number as the Director of the Administrative Office of the United States Courts may approve."); 28 U.S.C. § 711 (1982) ("(a) Each court of appeals may appoint a clerk . . . . (b) The clerk, with the approval of the court, may appoint necessary deputies, clerical assistants and employees . . . . ").

[7] Consequently, by act of Congress certain positions, such as the one filled by Brame, were abolished and appointment authority for certain posi-

tions changed. [8] For an employee to occupy a newly-created position, or one having changed appointment authority, a new appointment by the proper official was required. [9] Hence, Brame was not unlawfully removed from his employment because Congress, by statute , revoked his appointment as of October 1, 1982.

With regard to the alleged violation of 38 U.S.C. § 2021(b)(3) (1982), Brame's contention is meritless. As previously discussed, his position was abolished, not because of any discrimination against him because he was a member of a Reserve component of the Armed Forces, but by an act of Congress. Thus, the decision of the Claims Court is affirmed.

NEWMAN, Circuit Judge, concurs in the result.

86-1627

APPENDIX B

In the United States Claims Court

No. 58-84C

(FILED: June 30, 1986)

* * * * * * * * * * *		
RANDY BRAME,	*	
	*	Civil Pay; Abolish-
Plaintiff,	*	ment of Position by
	*	Law; Right to Federal
v.	*	Employment; Appoint-
	*	ing Authority; Dis-
THE UNITED STATES,	*	crimination Against
	*	Armed Forces Reserv-
Defendant.	*	ists.
* * * * * * * * * * *		

Martin Green, Washington, D.C., attorney for plaintiff.

Thomas W. Petersen, Washington, D.C., with whom was Acting Assistant Attorney Richard K. Willard, for defendant. Robert K. Loesche, of counsel.

OPINION

TIDWELL, Judge:

This is a civilian pay case which comes before this court on Cross-Motions for Summary Judgment. Plaintiff brought this suit pursuant to 28 U.S.C. § 1491

(1982), alleging that he was improperly removed from his position as a custodial employee/messenger on the rolls of the United States Court of Claims. Plaintiff seeks backpay, reinstatement to his job or to a comparable job, costs and attorneys fees. After a careful review of the pleadings, the submitted papers and the parties' briefs, the court concludes that defendant is entitled to judgment as a matter of law.

FACTS

Plaintiff, Mr. Randy Brame, began his employment with the United States Court of Claims on January 5, 1976. Plaintiff's first assignment was to work as a custodial employee/messenger on the personal staff of a judge in the appellate division of that court. Except for a short period from October 1978, to May 1979, when plaintiff worked as one of the deputy clerks in the office of the Court

of Claims, plaintiff held the position of custodial employee/messenger from the inception of his employee in 1976, until the United States Court of Claims ceased to exist on September 30, 1982. During the time period in question and while employed by the United States Court of Claims, plaintiff became a member of the United States Army Reserve and began eight weeks of basic training on July 17, 1981. From June 7, 1982, to September 3, 1982, plaintiff was on active duty with the Army Reserve. Approximately one month after his return from active duty the court was abolished along with his and all other positions.

On April 2, 1982, the Federal Courts Improvement Act of 1982 (FCIA) was enacted. 28 U.S.C. § 171, et seq. The FCIA provided that the United States Court of Claims would cease to exist on September 30, 1982, and the next day, October 1,

1982, the United States Court of Appeals for the Federal Circuit and the United States Claims Court would come into existence. 1/ [All footnotes are printed at the end of the opinion.]

Prior to the effective date of the FCIA, plaintiff learned that his name was one of three not included on a list of United States Court of Claims employees who would be appointed to a position on the United States Court of Appeals for the Federal Circuit. During normal working hours on September 30, 1982, the Clerk of the United States Court of Claims advised plaintiff that, effective the following day, he would no longer be employed by the court because the appellate division of the United States Court of Claims (the soon to be created United States Court of Appeals for the Federal Circuit) had decided to abolish plaintiff's position as soon as it became a separate court, and

not to appoint Mr. Brame to any other position.

It should be understood that in planning the creation of the two new courts, those positions that were assigned to the appellate division of the United States Court of Claims would be assumed by the United States Court of Appeals for the Federal Circuit. All other positions would be assigned to the United States Claims Court. Since plaintiff's position was assigned to the appellate division of the United States Court of Claims, his position would be assumed by the United States Court of Appeals for the Federal Circuit.

On October 1, 1982, the United States Court of Claims was abolished, including all of its positions, with the exception of the judges. the United States Court of Appeals for the Federal Circuit was simultaneously created, as was

the United States Claims Court. All of the support positions on both new courts were vacant and remained so until people were identified to fill them and the necessary personnel actions taken to appoint those people to the vacant positions.

On February 9, 1984, plaintiff filed his original complaint with this court, pro se, alleging that he had been improperly "fired" from his position. Subsequently, on February 29, 1984, plaintiff, through counsel, filed an Amended Complaint alleging that he had been improperly removed from his position as a custodial employee/messenger with the United States Court of Claims. In Count I of his Amended Complaint, plaintiff contended that he was not removed in accordance with 28 U.S.C. § 795 (1976) and that the abolition of the Court of Claims was not a legal basis for divesting him of

his job. In Count II, plaintiff contended that his dismissal was in violation of 38 U.S.C. § 2021(b)(3) (1982) which guaranteed him full employment rights notwithstanding any conflicting obligations or time away from work while serving as a member of the Armed Forces Reserve. Defendant argued that plaintiff was not removed from his position, but that plaintiff's position was abolished along with the Court of Claims on September 30, 1982, pursuant to the FCIA; that plaintiff was not appointed to a new position; and that plaintiff was not legally entitled to such an appointment. In addition, defendant contended that plaintiff's non-selection for a new federal position after October 1, 1982, was not in violation of 38 U.S.C. § 2021(b)(3) (1982). Consequently, defendant maintains that plaintiff has no cognizable claim under the Tucker Act, 28 U.S.C. § 1491 (1982), upon

which relief can be granted.

DISCUSSION

Summary judgment is appropriate only where there are no issues of material fact in dispute and judgment is appropriate as a matter of law. South Louisiana Grain Services, Inc. v. United States, 1 Cl. Ct. 281, 289 (1982). After a careful examination of the pleadings and the submitted papers, the court concludes that there are indeed no genuine issues of material fact in dispute and that this action is ripe for summary judgment.

I. Plaintiff's Claim Under 28 U.S.C. § 795

Before the enactment of the FCIA, 28 U.S.C. § 795 read as follows:

> The Court of Claims may appoint a bailiff and a messenger who shall be subject to removal by the court.
>
> The bailiff shall attend the court, preserve order, and perform such other necessary duties as the court directs.

28 U.S.C. § 795 (1976). 2/

Plaintiff contends that he was not removed from his position as custodial employee/messenger in accordance with 28 U.S.C. § 795 because he was not removed "by the court." Since he was not removed "by the court" on or before September 30, 1982, he automatically became an employee of one of the new courts effective October 1, 1982, and remains an employee until this day. It is not significant, however, whether plaintiff was considered to be employed by the Court of Claims on September 30, 1982, because it is clear that plaintiff's position was abolished at the moment the Court of Claims was abolished under the FCIA. This was true of all positions in the Court of Claims and not just plaintiff's position.

This court is of the opinion that "the repeal of a law creating an office abolishes the office." Abt v. United States, 146 Ct. Cl. 205, 210, cert.

dismissed, 361 U.S. 871 (1959). See also Lewis v. United States, 244 U.S. 134 (1917). In Abt v. United States, 146 Ct. Cl. 205, cert. dismissed, 361 U.S. 871 (1959), an Army officer sought to recover increased active duty pay on the ground that his pay should reflect, as a longevity factor, a period of inactive duty time. However, the Court of Claims held that plaintiff was not entitled to longevity credit because the law under which he held his commission as a captain of the United States Army was repealed at a later date which "operated to terminate on that date the plaintiff's appointment as captain in the Army of the United States." Id. at 210. The Court of Claims further held that the repeal of a law creating an office abolishes that office unless its existence is saved by some other legal provision after the repeal of the law which created or authorized it.

Id. at 210. In the instant case, the enactment of the FCIA repealed the law which created the United States Court of Claims and all personnel positions, including plaintiff's. The only exception provided in the FCIA was for the judicial positions which were retained under the Act. This is a clear indication of the Congressional understanding and intent that all other appointments were not to survive. Abt v. United States, 146 Ct. Cl. 205, 210-11, cert. dismissed, 361 U.S. 871 (1959).

Mr. Brame, and others similarly situated, may only enjoy a federal position if properly appointed to it. Thus, the judges and other appointing officers of the two new courts by necessity had to go through the exercise of formally selecting persons for positions in the new courts and then actually appointing those selected to the

new positions. The staffing of the new courts was not merely a continuation of former positions or simply a ministerial act as plaintiff contends. Rather, it involved the actual creation of new positions, since the former positions had been abolished, and the filling of those positions. In this matter both courts had great discretion, and within reason, the appointing officers could appoint any qualified person to any appropriate position. They could also elect not to appoint any person if, in their judgment, that individual was not qualified. Here the United States Court of Appeals for the Federal Circuit chose not to create the position formerly held by plaintiff which was abolished by operation of law on September 30, 1982, and not to offer him employment in any other position. Defendant is correct in its analysis of the case as a whole, "this is not a

'termination" case; it is an 'appointment' case." It may well be true that few of the appointing officers looked beyond the staff of the former courts when seeking candidates for the new positions, but the filling of these new positions was required by operation of law to be a discretionary activity. Keim v. United States, 177 U.S. 290, 293 (1900); see also Goutos v. United States, 212 Ct. Cl. 95, 552 F. 2d 922 (1976). There is no other way that plaintiff could have obtained employment in either of the newly created courts. 3/

Plaintiff's claim that he was the only person not given a new position on October 1, 1982, even if true, is irrelevant because the court had discretion to choose which positions to create and each appointing officer had discretion to decide who to select for those positions. It would not have been

unlawful if plaintiff had in fact been the only employee of the former courts not selected for subsequent employment. 4/

Plaintiff's claim that his "termination" constitutes a violation of 28 U.S.C. § 795 is totally without merit regardless of the hollow arguments put forth by counsel in support of the claim. Plaintiff's position under section 795 of Title 28 of the Code, both before and, as amended, after October 1, 1982, is that as a "mesenger" he could only be removed by the court, 28 U.S.C. § 795 (1976), or the chief judge of the United States Claims Court with the approval of the court. 28 U.S.C. § 795 (1982). This was not done and need not have been done for the reasons set forth above. To carry this argument to its most illogical extreme, the Congress of the United States is to blame. Congress enacted the FCIA which abolished the United States Court of

Claims and all of its personnel positions, including plaintiff's, leaving the two new courts with the responsibility of filling those positions as they saw fit, within reason and subject to the approval of the Director of the Administrative Office of the United States Courts. Moreover, 28 U.S.C. § 795 (1982), is applicable only to the chief judge of the United States Claims Court. If plaintiff was to be automatically appointed to any position it would have been on the United States Court of Appeals for the Federal Circuit. The chief judge of the United States Claims Court could not appoint Mr. Brame to a messenger job, or for that matter, to any job on the United States Court of Appeals for the Federal Circuit.

It is well established that the right to hold public employment is not a recognized fundamental right. Massachusetts Board of Retirement v. Murgia, 427

U.S. 307, 313 (1976). Federal employees do not have a constitutionally protected property interest in continued federal employment. Arnett v. Kennedy, 416 U.S. 134, reh'g denied, 417 U.S. 977 (1974). Moreover, federal employees' rights are not unlimited and extend no further than the limits of Federal law and the constitution. Donovan v. United States, 580 F.2d 1203, 1208 (3rd Cir. 1978).

The Court of Claims in Kirschner v. United States, 172 Ct. Cl. 526 (1965), held that "[i]n the absence of a grant of rights by statute or regulation, federal employees may be summarily denied new employment or continued federal employment in a new agency." Id. at 530. This rule clearly defeats plaintiff's argument. Plaintiff has failed to identify a statute or regulation whereby he is entitled to a position with the United States Claims Court or the United States Court of

Appeals for the Federal Circuit. Nor is plaintiff entitled to a position under equitable or contract principles because federal employment is a matter of legal status pursuant to statute and regulation and not a matter of contract or equity. United States v. Hopkins, 427 U.S. 123 (1976).

II. Plaintiff's Claim under 38 U.S.C. § 2021(b)(3)

Plaintiff also contends that the loss of his position violated 38 U.S.C. § 2021(b)(3) because he was discriminated against in that he "did not receive the same treatment afforded his co-workers." Section 2021(b)(3) reads as follows:

> Any person who [is employed by the federal government, a state government, or a private employer] shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

38 U.S.C. § 2021(b)(3) (1982).

In support of his position, plaintiff cited the following excerpt from Monroe v. Standard Oil Co., 452 U.S. 549 (1981):

> The legislative history thus indicates that § 2021(b)(3) was enacted for the significant but limited purpose pf protecting the employee-reservist against discriminations like discharge and demotion, motivated solely by reserve status. Congress wished to provide protection to reservists comparable to that already protecting the regular veteran from 'discharge without cause' - - to insure that employers would not penalize or rid themselves of returning reservists after a mere pro forma compliance with 2024(d). And the consistent focus of the administration that proposed the statute, and of the Congresses that considered it, was on the need to protect reservists from the temptation of employers to deny them the same treatment afforded their co-workers without military obligations. (footnote omitted).

Id. at 559-60.

Plaintiff suggests that his three-month absence from the United States Court of Claims and his return just four weeks prior to the dissolution of that court had

a direct impact on his loss of employment at the United States Court of Claims. The court disagrees.

It is clear from the language of the statute, 38 U.S.C. § 2021(b)(3) (1982), that government employees shall not be discriminated against, by the denial of employment, promotion, or other incidental advantages of employment because of any obligation as a member of a Reserve component of the Armed Forces. The Supreme Court has stated that the limited purpose of 38 U.S.C. § 2021(b)(3) is to protect employee-reservists against discriminations like discharge and demotion, "motivated solely by reserve status." Monroe v. Standard Oil Co., 452 U.S. 549, 559 (1981). However, as defendant has shown, plaintiff was not "discharged" from his position, rather the position plaintiff occupied was abolished along with the United States Court of

Claims and all of its support staff on September 30, 1982. Plaintiff has failed to show that the loss of his position or that his failure to obtain an appointment in the United States Court of Appeals for the Federal Circuit was "motivated solely by [his] reserve status." Indeed, plaintiff has not introduced any factual evidence of such a cause-and-effect relationship, but merely concludes that he "did not receive the same treatment afforded his co-workers." Accordingly, the court finds plaintiff's claim that he did not receive a new job "because of" his service in the Army Reserve to be totally without merit.

CONCLUSION

After a careful review of the submitted papers, parties' briefs and the applicable laws, the court concludes that plaintiff's position with the United States Court of Claims was abolished at

the time the United States Court of Claims was abolished pursuant to the Federal Courts Improvement Act, 28 U.S.C. 171, et seq., and that plaintiff was not automatically entitled to appointment to either of the two new courts. Furthermore, the court concludes that plaintiff has failed to show that his failure to receive an appointment was in violation of 38 U.S.C. § 2021(b)(3) (1982). Plaintiff is not entitled to back pay or reinstatement.

Accordingly, the court grants Defendant's Cross-Motion for Summary Judgment and denies Plaintiff's Motion for Summary Judgment. The clerk of the court is directed to dismiss the Complaint. Costs to defendant.

s/ Moody R. Tidwell IV

MOODY R. TIDWELL
Judge

1/ The United States Court of Customs and Patent Appeals was simultaneously abolished and its duties and responsibilities assumed by the United States Court of Appeals for the Federal Circuit. The judges of the United States Court of Customs and Patent Appeals and the appellate division of the United States Court of Claims were made judges of the United States Court of Appeals for the Federal Circuit. The trial judges of the United States Court of Claims became judges of the United States Claims Court.

2/ 28 U.S.C. § 795, as amended in 1982 reads:

> The chief judge of the United States Claims Court, with the approval of the court, may appoint necessary bailiffs and messengers, in such numbers as the Director of the Administrative Office of the United States Courts may approve, each of whom shall be subject to removal by the chief judge, with the approval of the court.

3/ The appointing authority is a judge, if the individual is to be employed within the chambers of that judge, and the clerk of the court for all other positions. 28 U.S.C. § 791 and § 794.

4/ For the record, the court notes that two other individuals were not selected for employment by the United States Court of Appeals for the Federal Circuit. Thus their appointments expired on September 30, 1982, just as did plaintiff's.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

RANDY BRAME,)

Appellant,)

v.) Appeal No. 86-1627

THE UNITED STATES,)

Appellee.)

Judgment

ON APPEAL from the United States Claims Court in CASE NO(S). 58-84C This CAUSE having been heard and considered, it is

ORDERED AND ADJUDGED:

AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED MAR 3 1987

s/ Francis X. Gindhart

Francis X. Gindhart, Clerk

APPENDIX D

In the United States Claims Court

FILED: June 30, 1986

No. 58-84C

RANDY BRAME

JUDGMENT

v.

THE UNITED STATES

Pursuant to the opinion of June 30, 1986, denying plaintiff's motion for summary judgment and granting defendant's cross-motion for summary judgment,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed. Costs to defendant.

Frank T. Peartree

Clerk of Court

June 30, 1986 By: s/Linda A. Eddins

Deputy Clerk

NOTE: As to appeal, 60 days from this date, see FRAP 4(a)

APPENDIX E

28 U.S.C. 455 Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding * * * .

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28 U.S.C. 711 Clerks and employees

(a) Each court of appeals may appoint a clerk who shall be subject to removal by the court.

(b) The clerk, with the approval of the court, may appoint necessary de-

puties, clerical assistants and employees in such number as may be approved by the Director of the Administrative Office of the United States Courts. Such deputies, clerical assistants and employees shall be subject to removal by the clerk with the approval of the court.

++++++++

28 U.S.C. 713 [pre-FCIA] Criers, bailiffs and mesengers

(a) Each court of appeals may appoint a librarian and necessary library assistants who shall be subject to removal by the court.

(b) Each court of appeals, except the Court of Appeals for the District of Columbia, may appoint a crier and such messengers as may be necessary, all of whom shall be subject to removal by the court.

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28 U.S.C. 713, post-FCIA: see § 120(b)(1), FCIA, 96 Stat. 33, below.

28 U.S.C. 714, post-FCIA: see §120(c)(1), FCIA, 96 Stat. 33, 34, below.

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28 U.S.C. 791(a), post-FCIA: see §121(a), FCIA, 96 Stat. 34, below.

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28 U.S.C. 794 [pre-FCIA] Stenographers and clerical employees

The Court of Claims shall appoint stenographic and other clerical employees in such numbers as may be necessary each of whom shall be subject to removal by the court.

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28 U.S.C. 794, post-FCIA: see §121(c)(1), FCIA, 96 Stat. 34, below.

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28 U.S.C. 795 [Pre-FCIA] Bailiff and messenger

The Court of Claims may appoint a bailiff and a messenger who shall be subject to removal by the court.

The bailiff shall attend the court, preserve order, and perform such other necessary duties as the court

directs.

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28 U.S.C. 795, post-FCIA: see §121(d)(1), FCIA, 96 Stat. 35, below.

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28 U.S.C. 1295, post-FCIA: see §127(a), FCIA, 96 Stat, 37 - 38, below.

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28 U.S.C. 1346 United States as a defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner unlawfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not

exceeding $10,000 in amount, founded either upon the Constitution, or any act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall

be considered an express or implied contract with the United States.

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28 U.S.C. 1491, post-FCIA: see §133(a), FCIA, 96 Stat. 39 -40 below.

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38 U.S.C. 2021 (b)(3) Right to reemployment of inducted persons; benefits protected

Any person who holds a position described in clause (A) [i.e., "in the employ of the United States Government"] or (B) [i.e., "in the employ of a State"] of subsection (a) of this section shall not be denied retention in employment or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces.

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PERTINENT PORTIONS OF THE FEDERAL COURTS IMPROVEMENT ACT OF 1982, P.L. 97-164, 96 Stat. 25 - 58

ORGANIZATION OF UNITED STATES CLAIMS COURT

Sec. 105.(a) Chapter 7 of title

28, United States Code, is amended to read as follows:

"CHAPTER 7 - - UNITED STATES CLAIMS COURT

[Here follows the text of 28 U.S.C. §§ 171 - 177 in their present form]."

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REPEAL OF PROVISIONS RELATING TO THE COURT OF CUSTOMS AND PATENT APPEALS

Sec. 106. Chapter 9 of title 28, United States Code, and the item relating to chapter 9 in the chapter analysis of part I of such title, are repealed.

++++++++

BUDGET ESTIMATES

Sec. 119 (a) * * * .

(b) Funds appropriated to the Court of Customs and Patent Appeals and the Court of Claims for fiscal year 1982 shall be made available for the operation of the United States Court of Appeals for the Federal Circuit and the United States Claims Court. Such sums shall be appor-

tioned among the new appropriations as determined by the Director of the Administrative Office of the United States Courts in consultation with the chief judges of the respective courts.

++++++++

DEFINITION OF COURTS

Sec. 120. (a) Section 610 of title 28, United States Code, is amended by striking out "the Court of Claims, the Court of Customs and Patent Appeals" and inserting in lieu thereof "the United States Claims Court."

(b)(1) Section 713 of title 28, United States Code, is amended to read as follows:

§713. Librarians

"(a) Each court of appeals may appoint a librarian who shall be subject to removal by the court.

(b) The librarian, with the approvoal of the court, may appoint

necessary library assistants in such numbers as the Director of the Administrative Office of the United States Courts may approve. The librarian may remove such library assistants with the approval of the court."

* * *

(c)(1) Chapter 47 of title 28, United States Code, is amended by adding at the end thereof the following new sections:

§714. Criers and messengers

"(a) Each court of appeals may appoint a crier who shall be subject to removal by the court.

"(b) The crier, with the approval of the court, may appoint necessary messengers in such numbers as the Director of the Administrative Office of the United States Courts may approve. The crier may remove such messengers with the approval of the court. The crier shall also

perform theduties of bailiff and messenger. * * * ."

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OFFICERS AND EMPLOYEES OF THE UNITED STATES CLAIMS COURT

Sec. 121. (a) Section 791 of title 28, United States Code, is amended by amending subsection (a) to read as follows:

"(a) The United States Claims Court may appoint a clerk, who shall be subject to removal by the court. The clerk, with the approval of the court, may appoint necessary deputies and employees in such numbers as may be approved by the Director of the Administrative Office of the United States Courts. Such deputies and employees shall be subject to removal by the clerk with the approval of the court."

(b) Section 792 of title 28, United States Code, and the item relating

to section 792 in the section analysis of chapter 51 of such title, are repealed.

(c)(1) Section 794 of title 28, United States Code, is amended to read as follows:

§794. Law clerks and secretaries

"The judges of the United States Claims Court may appoint necessary law clerks and secretaries, in such numbers as the Judicial Conference of the United States may approve, subject to any limitation of the aggregate salaries of such employees which may be imposed by law.".

* * *

(d)(1) Section 795 of title 28, United States Code, is amended to read as follows:

§795. Bailiffs and messengers

"The chief judge of United States Claims Court, with the approval of the court, may appoint necessary bailiffs and

messengers, in such numbers as the Director of the Administrative Office of the United States Courts may approve, each of whom shall be subject to removal by the chief judge, with the approval of the court.".

++++++++

ABOLISHMENT OF UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

Sec. 122. (a) Chapter 53 of title 28, United States Code, and the item relating to chapter 53 in the chapter analysis of part III of such title, are repealed.

(b) Section 957 of title 28, United States Code, is amended - -

(1) in subsection (a) by striking out "(a)", and

(2) by repealing subsection (b).

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TECHNICAL AND CONFORMING AMENDMENTS RELATING TO REPEAL OF COURT OF CUSTOMS AND PATENT APPEALS

Sec. 123. Sections 1255 and 1256 of title 28, United States Code, and the items relating to sections 1255 and 1256 in the section analysis of chapter 81 of such title, are repealed.

++++++++

JURISDICTION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Sec. 127. (a) Chapter 83 of title 28, United States Code, is amended by adding at the end thereof the following new sections:

§1295. Jurisdiction of the United States Court of Appeals for the Federal Circuit

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction - -

* * *

(3) of an appeal from a final decision of the United States Claims Court * * * .

UNITED STATES CLAIMS COURT JURISDICTION AND VENUE

Sec. 133. (a) Section 1491 of title 28, United States Code, is amended to read as follows:

§1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or

Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section

10(a)(1) of the Contract Disputes Act of 1978.

++++++++

REPEAL OF PROVISIONS RELATING TO THE COURT OF CUSTOMS AND PATENT APPEALS

Sec. 140. Chapter 167 of title 28, United States Code, and the items relating to chapter 167 in the chapter analysis of part VI of such title, are repealed.

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CONTINUED SERVICE OF CURRENT JUDGES

Sec. 165. The judges of the United States Court of Claims and of the United States Court of Customs and Patent Appeals in regular active service on the effective date of this Act shall continue in office as judges of the United States Court of Appeals for the Federal Circuit. Senior judges of the United States Court of Claims and of the United States Court of Customs and Patent Appeals on the effective date of this Act shall continue

in office as senior judges of the United States Court of Appeals for the Federal Circuit.

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APPOINTMENT OF CHIEF JUDGE OF COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Sec. 166. Notwithstanding the provisions of section 45(a) of title 28, United States Code, the first chief judge of the United States Court of Appeals for the Federal Circuit shall be the Chief Judge of the United States Court of Claims or the Chief Judge of the United States Court of Customs and Patent Appeals, whoever has served longer a chief judge of his court. Notwithstanding section 45 of title 28, United States Code, whichever of the two chief judges does not become the first chief judge of the United States Court of Appeals for the Federal Circuit under the preceding sentence shall, while in active service, have precedence and be

deemed senior in commission over all the circuit judges of the United States Court of Appeals for the Federal Circuit (other than the first chief judge of that circuit). When the person who first serves as chief judge of the United States Court of Appeals for the Federal Circuit vacates that position, the position shall be filled in accordance with section 45(a) of title 28, United States Code, as modified by the preceding sentence of this section.

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COURT OF CLAIMS COMMISSIONERS

Sec. 167. (a) Notwithstanding the provisions of section 171(a) of title 28, United States Code, as amended by this Act, a commissioner of the United States Court of Claims serving immediately prior to the effective date of this Act shall become a judge of the United States Claims Court on the effective date of this Act.

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APPOINTMENT OF JUDGES BY THE PRESIDENT

Sec. 168. The Congress - -

(1) takes notice of the fact that the quality of the Federal judiciary is determined by the competence and experience of its judges; and

(2) suggests that the President, in nominating individuals to judgeships on the United States Court of Appeals for the Federal Circuit and the United States Claims Court, select from a broad range of qualified individuals.

APPENDIX F

1. Excerpt from House of Representatives Report no. 96-1300, submitted by the Committee on the Judiciary on H.R. 3806, 96th Congress, 2d Session (September 5, 1980):
[Page 23:]

Constitutionality

Congress has an independent and affirmative obligation continually to determine the constitutionality of legislation.24 The Committee has considered the possible constitutional questions that arise from the reallocation of the personnel of the Court of Claims and of the Court of Customs and Patent Appeals to the new Court of Appeals for the Federal Circuit or the new Claims Court. The Committee has concluded there is no constitutional objection to these reallocations. 25/

24/ See Brest, The Conscientious Legislator's Guide to Constitutional

Interpretation, 27 Stan. L. Rev. 585 (1975); (H. Rep. No. 96-287 96th Cong., 1st Sess. 1979).

25/ Article III, section 1, of the Constitution explicitly empowers the Congress to ordain and establish inferior courts. Consequently, the only questions concern the relation between the power of Congress, under Article I, section 8, cl. 18, of the Constitution to alter, enlarge or restrict the functions of existing federal officers and the requirement of the Appointments Clause, Article II, section 2, cl. 2, that appointments as officers of the United States be made in the manner prescribed by that clause. Stated differently, this involves a reconciliation of the Supreme Court's decisions in Shoemaker v. United States, 147 U.S. 282, 301 (1893) and Buckley v. Valeo., 424 U.S. 1, 118-36 (1976). The earlier case stated the principle that Congress may, by

statute, confer new duties on officers of the United States, at least where the new duties are "germane" to their existing functions, without the necessity of reappointment under the Appointments Clause. The later holds that Congress may not itself appoint officers of the United States.

The Committee has concluded that the carry-over of the trial judges into the Claims Court is a modification of an existing position rather than a legislative appointment to a new one, governed by Buckley. The bill merely would confer "germane" new duties and extend the tenure of the existing trial judges as permitted by Shoemaker, rather than create a new office.

The Committee has concluded that it is also permissible under Shoemaker for Congress by statute, and without a fresh Presidential nomination and Senatorial

confirmation, to make the judges of the Court of Claims and the Court of Customs and Patent Appeals, upon the abolition of those courts, judges of the newly created United States Court of Appeals for the Federal Circuit. No loss of authority, status, tenure, or compensation is involved and no judge is removed from hearing cases he had previously heard. It is, in the Committee's view, within Congress' power under Article I, section 8, cl. 9 and 18, to reallocate the business and personnel of the lower federal courts under these conditions.

2. Excerpt from Hearings Before a Subcommittee of the Committee on Appropriations, House of Representatives, Ninety-seventh Congress, Second Session -- Subcommittee on the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies. Part 4 - The Judiciary (March 9, 1982):
[Page 401:]

COURT OF CUSTOMS AND PATENT APPEALS

WITNESSES

Howard T. Markey, Chief Judge

George E. Hutchinson, Clerk

Mr. Hightower. We welcome Judge Markey and the Court of Customs and Patent Appeals.

* * *

[Page 408:]

We are happy to have you with us, Judge Markey. We will be happy for you to proceed.

GENERAL STATEMENT

Judge Markey. Thank you, Mr. Chairman. It is a pleasure to appear before you and the committee Members. I should likethe privilege of presenting our clerk, Mr. George Hutchinson, who is sitting with me.

* * *

[Page 411:]

Mr. Hightower. If the Congress enacts legislation which establishes effective October 1, 1982, a new U.S.

Federal Court of Appeals for the Federal Circuit and a new U.S. Claims Court, have you determined how the funds will be allocated?

Judge Markey. Yes, we have.

Mr. Hightower. Would you like to furnish that for the record?

Judge Markey. We can write it up better. We have it written in pencil now. We will be glad to submit it for the record, but I can say at the moment that it is virtually identical with what we submitted to the Congress when it considered the bill originally, and it comes out about 51 - 49, or 51 1/2 to 48.5 percent for each of the two courts. We keep to the same amount without change that will be appropriated by this committee. No addition.

[The following information was submitted:]

ATTACHMENT NO. 1. - PROPOSED FUNDING

	Present Request Fiscal Year 1983			Proposed Funding After Merger		
	Court of Customs and Patent Appeals	Court of Claims	Total	Court of Appeals Federal Circuit	Claims Court	Total
11 Personnel Compensation	1,251	3,835	5,086	2,556	2,530	5,086
12 Personnel benefits	98	347	445	201	244	445
21 Travel and transportation of persons	8	51	59	33	37	70
22 Transportation of things	1	6	7	3	4	7
23 Standard level user charges	1,170	3,265	4,435	2,260	2,175	4,435
23 Communication, utilities and other rent	55	141	196	96	100	196
24 Printing and reproduction	6	220	226	84	120	204
25 Other Services	39	168	207	85	122	207
26 Supplies and materials	9	25	34	17	17	34
31 Equipment	23	48	71	50	32	82
Total	2,660	8,106	10,766	5,385	5,381	10,766

	PROPOSED STAFFING POSITIONS				
U.S. Court of Appeals for the Federal Circuit	Court of Customs and Patent Appeals	Court of Claims	Total	Court of Appeals Federal Circuit	Claims Court
Chief Judge	1	1	2	1*	--
Judges	4	6	10	11	--
Judges Staff	15	22	37	37	--
Senior Technical Asst. & Staff	3	--	3	3	--
Librarian and Staff	1	1	2	2	--
Clerk of Court and Staff	12	6	18	18	--
Total, United States Court of Appeals for the Federal Circuit	36	36	72	72	--

United States Claims Court					
Judges (incl. Chief Judge)	--	17	17	--	17
Judges Staff	--	38	38	--	38
Clerk of Court and Staff	--	23	23	--	23
Total, United States Claims Court	--	78	78	--	78
Total all courts	36	114	150	72	78

*The Chief Judge of the United States Court of Customs and Patent Appeals becomes Chief Judge of the United States Court of Appeals for the Federal Circuit and the Chief Judge of the United States Court of Claims becomes Senior Associate Judge of the United States Court of Appeals for the Federal Circuit.

Note: Staffing and funding for the Claims Court are based on the concept that presently assigned staff will be retained by that court. The Administrative Office of U.S. Courts intends to conduct a work measurement study of the court and if that study results in changes in staffing and funding, these changes will be reported to the Committee.

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COURT OF CLAIMS

Witnesses

Daniel M. Friedman, Chief Judge

Frank T. Peartree, Clerk

Mr. Hightower. The final item we will consider today is the fiscal year 1983 budget request for the Court of Claims.

* * *

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Questions for the Record by Mr. Hightower

COURT REORGANIZATION

Question: Since your Court is equally affected by the Federal Courts Improvement Act, I am going to ask you the same question that I asked earlier this afternoon to Judge Markey. I am asking both Courts to prepare a statement describing how the funding and positions

you are requesting for FY 1983 for your respective Courts will be allocated to the proposed Federal Circuit Court and U.S. Claims Court.

PROPOSED FUNDING

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U.S. Court of Appeals for the Federal Circuit					
Chief Judge	1	1	2	1*	--
Judges	4	6	10	11	--
Judges Staff	15	22	37	37	--
Senior Technical Asst. & Staff	3	--	3	3	--
Librarian and Staff	1	1	2	2	--
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Judges (incl. Chief Judge)	--	17	17	--	17
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APPENDIX G

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

L.RALPH MECHAM
Director

WILLIAM R. BURCHILL, JR.
General Counsel

JAMES E. MACKLIN, JR.
Deputy Director

April 27, 1987

Mr. Martin Green
Attorney at Law
240 M Street, S.W.
Washington, D.C. 20024

Re: Freedom of Information Act Request

Dear Mr. Green:

I am writing in response to your request of April 15, 1987, for the names and appointment dates of each librarian, library assistant, and crier and messenger employed by the United States courts of appeals as of January 1, 1983. I am declining your request because the Freedom of Information Act does not apply to the Judicial Branch of the Federal Government.

5 U.S.C. §§551(1), 552(e).

You note in your request that you are seeking this information in connection with a petition for writ of certiorari in the case Brame v. United States, No. 86-1627 in the United States Court of Appeals for the Federal Circuit. I have been advised by counsel, however, that the period for discovery was closed before the filing of motions for summary judgment in the United States Claims Court.

Sincerely,

s/ William R. Burchill, Jr.
William R. Burchill, Jr.
General Counsel

cc: Mr. Thomas W. Petersen, Commercial Litigation Branch, Civil Division, Department of Justice